

DATE: May 14, 2002

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In Re:

[Redacted]

Claimant

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Claims Case No. 02050612

## **CLAIMS APPEALS BOARD DECISION**

### **DIGEST**

Waiver of a debt that arose from the erroneous payment of Overseas Housing Allowance (OHA) at the single rate is improper when the member was specifically advised at the time that his dependents returned home that OHA could not be paid if the member also received basic allowance for quarters and variable housing allowance for his dependents, and when the member's leave and earnings statements clearly showed that OHA and the other entitlements were being paid to him at the same time.

### **DECISION**

A retired Navy commander appeals the June 29, 2001, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 01060402 that sustained the decision of the Defense Finance and Accounting Service to deny waiver of the member's debt that arose from an erroneous overpayment of \$30,766.39 in Overseas Housing Allowance (OHA).

### **Background**

The record indicates that the member received OHA at the single rate during the period July 15, 1995, through August 8, 1997, even though he resided in a Bachelor Officers' Quarters (BOQ) during that period.

Generally, the member bases his request for relief on the fact that he was the victim of several administrative errors and that service support personnel have an obligation to properly execute their administrative duties. The administrative lapses are summarized as follows:

The Personnel Support Detachment (PSD) at his overseas installation failed to properly re-compute his pay after his family departed. The member says that he was "emphatically told" at that time that he was not permitted to receive OHA while he was also receiving Basic Allowance for Quarters (BAQ) and Variable Housing Allowance (VHA) for his family living in Virginia.

The member also notes that the base Public Works Center did not properly process his paperwork when he vacated off-base family housing, and as a result, they did not properly report to the PSD that he no longer resided off-base. He also notes that part of the Public Works Center removed his name from the off-base utility reimbursement list; therefore, they knew he no longer lived off-base and started to process "proper paperwork" to that effect.

Every month the BOQ reported his name to PSD as a BOQ resident. The member states that the purpose of the report was to ensure that BOQ residents did not receive unauthorized allowances. If the PSD staff members had properly performed their duties, the member suggests that they would have noticed that he was in the BOQ and stopped his OHA.

The Navy continued to overpay him after they discovered the problem.

He was on temporary duty for the first four months after his pay was adjusted, when his leave and earnings statement (LES) was distributed. He also noted that he received a LES each month, and he explained that he was on "TAD" at the mid-month period each month when the LES was distributed. He says that he became accustomed to the new amount of pay during this period, which, except for small changes to adjust for COLA rate changes, generally did not change again. He emphasizes that he was not aware that his LES showed a single OHA rate or that he was being overpaid. He speculates that "in hindsight I probably subconsciously ignored it due to the fact that I was told I could not receive multiple location housing allowances."

## Discussion

Under 10 U.S.C. § 2774, we may waive collection of a claim for the erroneous overpayment of pay and allowances against a service member if collection would be against equity and good conscience and is not in the best interest of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. *See also Standards for Waiver*, 4 C.F.R. § 91.5 (1996). In the present case the erroneous OHA overpayments were made as a result of administrative errors, and for purposes of this appeal we assume that there is no indication of fraud, misrepresentation, or lack of good faith on the member's part. However, the member is at least partially at fault and waiver is precluded when, in light of all of the circumstances, it is determined that he should have known that an error existed and taken steps to have it corrected. The standard we employ is whether a reasonable person should have suspected that he was receiving payments in excess of his entitlement. *See* Comptroller General decisions B-256417, July 22, 1994, and B-256600, July 14, 1994. *See also* DOHA Claims Case No. 97062629 (July 17, 1997).<sup>(1)</sup> A member

is not entitled to waiver as a matter of right merely because he was erroneously overpaid due to administrative error. *See* DOHA Claims Case No. 02030502 (March 22, 2002). Even where an agency commits substantial and continuous administrative errors, that fact alone is no basis for granting waiver. *See* DOHA Claims Case No. 99020211 (February 18, 1999), *aff'd* by the Deputy General Counsel (Fiscal) on January 9, 2001.

The member suggests that he was absent at the mid-month point when his LES was distributed on each of the first four months following the departure of his family. However, the member acknowledges that he received all of his LESs, and nothing in the record suggests that the statements were unavailable to the member as he returned from temporary duty in each instance or at the end of the period. The decisions of our Office and those of the Comptroller General indicate that waiver is not appropriate when a member or employee has records which would indicate an overpayment (*e.g.*, LESs) and the member fails to review such documents for accuracy or otherwise fails to take corrective action. *See* DOHA Claim Case No. 02030502, *supra*; DOHA Claims Case No. 01102309 (November 14, 2001); and B-252973, Sept. 23, 1993. The member admits that he was emphatically told that he was not permitted to receive OHA while he was also receiving BAQ and VHA for his family living in Virginia. The member suggests that he was somehow lulled into believing that the government therefore would not pay him both entitlements, but he also admits that he did not check his LES for this possibility. Both entitlements were clearly itemized on the LES from the very beginning.

It is unfortunate that the member may have been the victim of negligent administrative personnel who could have avoided the erroneous overpayments or caught them at an earlier point in time before the debt became substantial. On the other hand, the member, a relatively senior and experienced officer, knew that he was not entitled to both entitlements and that he should have checked his LES. In these circumstances, we agree with DFAS that it is inappropriate to waive the debt.

### Conclusion

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

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Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Christine M. Kopocis

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Christine M. Kopocis

Member, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin

Member, Claims Appeals Board

1. The DOHA decision involved a civilian employee who sought waiver under a companion statute, 5 U.S.C. § 5584, but the same Standards of Waiver apply.